KEEGAN WERLIN LLP

ATTORNEYS AT LAW
265 FRANKLIN STREET
BOSTON, MASSACHUSETTS 02110-3113

(617) 951-1400

TELECOPIERS:
(617) 951-1354
(617) 951-0586

February 15, 2006

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: NSTAR Electric, D.T.E. 05-84

Dear Ms. Cottrell:

On behalf of Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company, d/b/a NSTAR Electric ("NSTAR Electric"), please find attached NSTAR Electric's Opposition ("Opposition") to the Motion for Reconsideration and Clarification filed by the Retail Energy Supply Association ("RESA") in the above-referenced proceeding. The Opposition also responds to RESA's February 7, 2006 letter to the Department of Telecommunications and Energy (the "Department") seeking a stay of the Department's January 12, 2006 order in this proceeding.

Please do not hesitate to contact me if you have any questions regarding the filing.

Very truly yours,

John K. Habib

cc: Jeanne Voveris, Hearing Officer
Ron LeComte, Director, Electric Power Division
Joseph Rogers, Chief, Utilities Division, Office of the Attorney General
Colleen McConnell, Assistant Attorney General
Gary Epler, Senior Counsel, Unitil
Amy Rabinowitz, Assistant General Counsel, National Grid
Stephen Klionsky, Western Massachusetts Electric Company
Jean-Paul St. Germain, Sempra Energy Trading
Jeremy Wodakow, J. Aron & Company

Robert Rio, Associated Industries of Massachusetts
Eric K. Runge, Esq.
Christopher H. Kallaher, Esq.
Rachel Graham Evans, Esq.
Mark C. Kalpin, Esq.
Jonathan S. Klavens, Esq.
Robert J. Munnelly, Jr., Esq.
Roger Borghesani
James Daly
Kerry Britland
Tam Ly

Enclosures

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company d/b/a NSTAR Electric for Approval by the Department of Telecommunications and Energy of Proposed Revised Tariffs Relating to the Companies' Terms and Conditions For Distribution Services and Competitive Suppliers	))))))	D.T.E. 05-84

OPPOSITION OF NSTAR ELECTRIC TO MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

On February 1, 2006, the Retail Energy Supply Association ("RESA") filed with the Department of Telecommunications and Energy (the "Department") a Motion for Reconsideration and Clarification (the "Motion") of the Department's January 12, 2006 order (the "Order") in this proceeding. The Order approved a proposal by Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company, d/b/a NSTAR Electric (together, "NSTAR Electric" or the "Company") to implement a provision in their Terms and Conditions for Distribution Services and Competitive Supply, respectively, to restrict the practice of certain retail competitive suppliers of switching a customer on and off Basic Service multiple times during the term of the customer's supply contract. Order at 18.

Specifically, consistent with the Company's proposal, the Department directed the Company to file Terms and Conditions that preclude a customer that has switched from a competitive supplier to Basic Service from returning to the same competitive supplier for a period of six months from the effective date of the change, unless the customer has

been placed on Basic Service upon the expiration of a contract with such competitive supplier (Order at 18). The Company submitted a compliance filing responsive to the Department's directive on January 20, 2006, with proposed Terms and Conditions tariffs for the Department's approval. The Department approved the Company's compliance tariffs on January 31, 2006.

RESA has asked the Department: (1) to reconsider and reverse the Order and immediately open an hourly pricing docket; and (2) to reconsider and clarify certain aspects of the Order prior to implementation (Motion at 4, 9). The Company requests that the Department deny RESA's Motion. RESA's Motion fails to meet the Department's standard of review for reconsideration in that it neither: (1) establishes any previously unknown or undisclosed facts that would have an impact on the Order; nor (2) demonstrates that the Order was the product of a mistake or inadvertence. Accordingly, the Department should deny RESA's Motion for the reasons presented below.

In addition, RESA requests in its Motion and via a letter dated February 7, 2006 that the Department stay the implementation of the Order pending the establishment of implementation procedures (see Motion at 17). However, RESA has failed to provide the Department with any support for its request or otherwise to articulate why its request meets the Department's standard of review for a stay (which, as demonstrated herein, it would not meet). Accordingly, the Department should also deny RESA's request to stay the Order.

II. STANDARD OF REVIEW

A. Reconsideration

The Department's standard for reviewing a motion for reconsideration and clarification of its decisions is well-established. Reconsideration of previously decided issues is granted only when circumstances dictate that the Department take a fresh look at the record for the purpose of modifying a decision reached after review and deliberation. Consolidated Arbitrations, Phase 4-M at 5 (1999), citing North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987). Rather than simply rearguing issues considered and decided, a motion for reconsideration must bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. Consolidated Arbitrations, Phase 4-M at 5 (1999), citing Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983).

In the alternative, a motion for reconsideration may be granted if it is shown that the Department's disposition of an issue was the product of mistake or inadvertence. Consolidated Arbitrations, Phase 4-M at 5 (1999), citing Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983). Reconsideration also may be appropriate where parties have not been "given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. Petition of CTC Communications Corp., D.T.E. 98-18-A at 2, 9 (1998).

B. Clarification

The Department's standard of review for clarification of its decisions is also well-settled. The Department has stated that "[c]larification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning." Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). "Clarification does not involve reexamining the record for the purpose of substantively modifying a decision." Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas and Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

C. Stay

The Department has established a standard for a stay in the context of its decisions that are pending judicial appeal. In those circumstances, the Department considers: (1) the likelihood that the moving party will prevail on the merits of the appeal; (2) the likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay. Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy, No. SJ-2001-0298 at 2 (November 16, 2001) (order denying motion for stay), Boston Edison Company, D.P.U. 92-130-A at 7, n.7 (1993); Appeal of Robert K.M. Lynch, D.P.U. 88-203-A at 5 (1990). The Department also considers: (1) whether there are far-reaching consequences of a specific adjudicatory decision that is being litigated on appeal; (2) the impact upon the parties pending appeal of a novel and complex case; or

(3) whether significant legal issues are involved. Stow Municipal Electric Department, D.P.U. 94-176-A at 2 (1996).

III. RESA'S MOTION FAILS TO MEET THE DEPARTMENT'S STANDARD OF REVIEW FOR RECONSIDERATION AND SHOULD BE DENIED

RESA asks the Department to reconsider the Order based on the following contentions: (1) the Department failed to address arguments that NSTAR Electric's proposal will harm customers, retail suppliers and the market (Motion at 4); (2) the Department did not closely examine the evidence and perform a cost-benefit analysis (id. at 6); and (3) NSTAR Electric should not be allowed to act as a "compliance monitor" of the policy (id. at 9). RESA also uses the Motion to reiterate its request that the Department open up a generic proceeding addressing hourly pricing (id. at 8).

As discussed herein, RESA's Motion fails to meet the Department's standard of review for reconsideration because RESA has failed to allege any previously unknown facts that would warrant reconsideration or demonstrate that the Department's Order was the product of a mistake or inadvertence. Moreover, by using the Motion to reiterate once again its preference for a generic proceeding addressing hourly pricing, RESA ignores the Department's precedent on motions for reconsideration that states unequivocally that requests for reconsideration should not reargue issues that have been considered and decided by the Department. See Consolidated Arbitrations, Phase 4-M at 5 (1999), citing Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). Accordingly, the Department should deny RESA's Motion for Reconsideration.

A. The Department's Order Was Within its Broad Discretion to Establish Policy.

RESA contends that the Order should be reconsidered because, in RESA's view, the Department failed to consider issues raised in comments by the opponents of NSTAR Electric's proposal, or "conduct any analysis of this evidence and arguments" in its granting of the NSTAR Electric proposal (Motion at 4-8). In support of this contention, RESA cites two provisions of G.L. c. 30A ("Chapter 30A"): (1) Section 11(8), which requires administrative agencies to accompany each decision by a "statement of reasons" supporting the decision; and (2) Section 14(7), which addresses the rights of persons aggrieved by a final decision an agency in an adjudicatory proceeding to seek judicial review (Motion at notes 12, 13). First, RESA's allegation neither brings to light any unknown facts or issues that would justify reconsideration of the Order, nor references a mistake or inadvertent error on the part of the Department. Accordingly, for these reasons alone, RESA's allegation should be rejected because it fails meet the Department's standard of review for reconsideration.

In addition, RESA's allegation is based on a misreading of G.L. c. 30A. Chapter 30A, § 11(8), and § 14(7) apply only to adjudicatory proceedings, and not to proceedings such as this where the Department is furthering governmental policy through an investigation regarding the provision of Basic Service. An "adjudicatory proceeding" is defined as:

> a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.

G.L. c. 30A, § 1. The instant proceeding does not meet that definition. In this proceeding, NSTAR Electric proposed to implement Terms and Conditions tariffs that applied the Department's policies on the provision of Basic Service in a manner consistent with the Department's established Basic Service precedent. Specifically, NSTAR Electric's proposal was based upon the recognition that the practice of multiple switching increased costs to customers and was not in accordance with the Department's Basic Service policies and prior rulings because the practice utilized Basic Service as a competitive supply option, rather as a short-term, last-resort service (NSTAR Electric Reply Comments at 3-4).

During the Department's investigation, NSTAR Electric offered detailed evidence supporting its contention (Exh. NSTAR-JGD-1, at 4-9; NSTAR Electric Reply Comments, Att. B-1, B-2, C and D) and the other participants in the proceeding submitted a myriad of comments, both in favor of NSTAR Electric's proposal and in opposition (Order at 3-14). Ultimately, the Department's Order agreed with NSTAR Electric and various other participants, including wholesale suppliers, other distribution companies and the Associated Industries of Massachusetts, based on the Department's determination that multiple switching "has the potential to raise prices for large [commercial and industrial ("C&I")] customers who rely on basic/default service as a service of last resort" (Order at 16).

This proceeding was focused on an interpretation of the Department's Basic Service policy. The Department may act on issues that apply its policies outside of the scope of an adjudicatory proceeding. See Town of Carlisle v Department of Public Utilities, 353 Mass. 722 (1968)(Department decision authorizing a gas company to make

an entry and preliminary survey on private property was not the result of an adjudicatory proceeding pursuant to statute but rather involved a question of governmental policy).[1] In fact, many Department determinations take place in the context of rulemakings, notices of inquiry or other types of investigations.[2] Accordingly, not only do RESA's allegations not meet the Department's standard for reconsideration, they are based on inapplicable precedent governing adjudicatory proceedings and should be rejected by the Department.

B. RESA's Motion Merely Reiterates Arguments That it Made During the Proceeding.

RESA uses the Motion to reiterate its previous argument that the Department should "immediately open an hourly pricing docket" (Motion at 8-9). The Department's Order explicitly acknowledged this argument, to the point of agreeing that moving to hourly pricing for large C&I customers may resolve the issue raised by NSTAR Electric (Order at 16). Therefore, there is nothing in this area warranting reconsideration.

In that regard, the Department also concluded in the Order that moving to hourly pricing was an issue to be resolved over the long term and would require a full

---

1 Moreover, even if this proceeding were an adjudicatory proceeding pursuant to Section 30A, RESA had no affirmative proposal before the Department requiring Department action. Its only role was in opposition to the Company's filing, the acceptance or rejection of which was the issue before the Department. Accordingly, the Department's role in analyzing RESA's comments or the comments of others in the proceeding is of no consequence. Trustees of Clark University v. Department of Public Utilities, 372 Mass. 331 (1977) (Court ruled that, unless an error of law or misconception shown in an agency's treatment of the case on behalf of an intervener prejudicially taints the agency's decision on the principal matter before it, the relative merits of the intervener's case is of no consequence in the Court's appellate assessment of the propriety of an agency's action).

2 The Department develops policy in non-adjudicatory proceedings on a regular basis. For example, the Department's initial docket governing electric restructuring issues (D.P.U. 96-100) and its proceeding governing the development of Terms and Conditions relating to electric restructuring (D.P.U. 97-96) were each non-adjudicatory proceedings, as were the Department's dockets governing the development of its Default Service policy (D.T.E. 99-60 and D.T.E. 02-40).

examination of costs and benefits, and thus, a shorter-term solution to the problem of multiple switching was warranted (id. at 16-17).[3] The Department's precedent on requests for reconsideration is clear that such requests should not be an attempt to reargue issues already considered and decided during a proceeding, but rather must bring to light unknown facts that would warrant reconsideration of a prior decision. See Consolidated Arbitrations, Phase 4-M at 5 (1999), citing Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). Accordingly, the Department should reject RESA's attempt to use its Motion as a means of rearguing its request for an hourly pricing docket.

C. NSTAR Electric's Role in Enforcing the Provisions of its Tariffs Is Proper.

RESA's last argument in favor of reconsideration is based on its perception of NSTAR Electric's role as a "compliance monitor" of its Terms and Conditions (Motion at 9). Specifically, RESA contends that NSTAR Electric should not enforce its Terms and Conditions and alleges that: (1) NSTAR Electric has demonstrated a willingness to disregard the Department's orders (id. at 10-12);[4] (2) NSTAR Electric's enforcement procedure will create "an extraordinary and unnecessary administrative burden on retail

---

3 This determination is consistent with the Department's prior findings on moving toward hourly pricing for Basic Service. See Investigation by the Department Into the Provision of Default Service, D.T.E. 02-40-B at 37-38 and Investigation by the Department Into the Pricing and Procurement of Default Service, D.T.E. 99-60-A at 16. RESA's Motion advances no basis to reverse the Department's previous rulings on this same topic.

4 Contrary to RESA's allegations, the Company complied with the Department's directives in note 4 of the Order by establishing an enforcement policy that affects only a limited number of transactions (i.e., those in which a Basic Service customer seeks to return to the same competitive supplier that served them within the previous six months). The Company presented this policy in its January 20, 2006 cover letter in order to be consistent with the remainder of its Terms and Conditions tariffs, which do not include detailed provisions addressing enforcement procedures.

suppliers and customers" (id. at 13); (3) the Department "erred at the outset by expressly encouraging NSTAR Electric to serve any role in assuring compliance" (id.); and (4) the Department should enforce compliance "if needed at all" through reporting requirements and post-transaction reviews (id. at 14). These contentions boil down to a request for reconsideration based on the fact that NSTAR Electric will be enforcing its own Terms and Conditions.

Clearly, RESA's request on these grounds must fail because it is based upon the incorrect premise that distribution companies are not properly authorized to enforce the terms of their own tariffs, subject to Department review. An electric distribution company's Department-approved tariffs govern the means by which the distribution company, its customers and third parties interact in order to ensure that the company meets its obligation to serve customers reasonably, fairly and consistently in the provision of electricity. The very purpose of Terms and Conditions is to establish procedures that distribution companies will enforce and monitor to ensure that they, their customers and other market participants comply with Department policies.

RESA's contentions on this issue suggest that the Department, in approving the Order, somehow has ceded its authority over NSTAR Electric to enforce the Department's policies. Nothing could be further from reality. The Department has general supervisory authority over all electric distribution companies, and has not, nor could not, relinquish this authority to NSTAR Electric. G.L. c. 164, § 76. The Department also has specific authority to approve and oversee compliance with its established tariffs. G.L. c. 164, § 94. RESA's argument is thus completely off the mark.

In point of fact, distribution companies regularly are in the position of enforcing and applying their tariffs as to rates and terms and conditions matters. For example, with regard to Company enforcement of its tariffs vis-à-vis competitive suppliers, the Company enforces its Terms and Conditions for Competitive Suppliers by rejecting enrollment of customers onto competitive supply if a supplier fails to comply with certain switching protocols. If RESA had its way, the Company would not be able to enforce its Terms and Conditions regarding switching protocols in the event of supplier non-compliance, but, rather, would have the Company report to the Department every instance of a supplier's non-compliance and have the Department conduct a "post-transaction review" to determine whether NSTAR Electric should have enrolled the customer (see, e.g., Motion at 14). RESA's allegations are without support. Accordingly, the Department did not err in allowing NSTAR Electric to enforce its own Terms and Conditions and RESA's allegations to that end are untenable. Therefore, for these reasons and those referenced previously, the Department should deny RESA's Motion for Reconsideration.

IV. RESA's MOTION FOR CLARIFICATION SHOULD BE DENIED

RESA seeks Department clarification of its Order to address three new "exceptions" to the Department's anti-"gaming" policy that were not explicitly addressed during the proceeding: (1) situations involving the inadvertent return of a customer to Basic Service (Motion at 15); (2) returns to Basic Service because of customer non-payment (id. at 16); and (3) limiting a customer's "right to return" to be applicable to only those retail competitive suppliers that served the customer most recently prior to the customer's placement on Basic Service (id. at 16-17).

The Department should not clarify its Order to address these situations. To the extent that a Basic Service customer or their prospective competitive supplier can demonstrate to the Company that the customer was switched from a competitive supplier to Basic Service during the previous six months because of error, the Company would not restrict the customer from switching back to the competitive supplier that served them during the previous six months. It has never been the Company's intent to have its proposal apply to inadvertent or mistaken transactional changes.

For different reasons, the Department should not clarify the Order to make further exceptions for instances where a customer is placed on Basic Service because of non-payment to the Supplier or to limit the scope of the policy only to suppliers that served a customer most recently during the previous six-month period. If the Department agreed to clarify the Order to allow for further exceptions to the anti-gaming policy, it could create a "slippery slope" of increasingly unenforceable exceptions to the policy, which will ultimately result in its failure. Moreover, these "exceptions" are the very type of situations that can by themselves be the subject of gaming. The Company's objective in proposing the change to its Terms and Conditions was to eliminate insofar as reasonably possible ongoing practices among suppliers and large customers that were having the effect of increasing the price for Basic Service and thereby increasing costs to other customers. As approved by the Department, the Company's Terms and Conditions achieve that objective. Therefore, the Department should allow the policy to be implemented as described in the Company's Terms and Conditions. Accordingly, the Department should not clarify the Order with respect to the issues raised by RESA.

V. THE DEPARTMENT SHOULD REJECT RESA'S REQUEST TO STAY THE IMPLEMENTATION OF THE COMPANY'S TERMS AND CONDITIONS

In its Motion, and in a separate letter dated February 7, 2006, RESA asks the Department to suspend the implementation of the Company's Terms and Conditions tariffs, pending resolution of operation issues (see Motion at 17). Neither statute nor the Department's procedural rules provides explicitly for a stay pending reconsideration of a Department order. Rather, the Department has historically ruled on stays only in the context of staying a final order pending a judicial appeal.

In this instance, RESA has failed to file a notice of appeal to the Supreme Judicial Court of the Department's Order, and has allowed the appeal period to expire. Moreover, RESA's Motion fails to articulate the Department's standard of review for granting a stay. Instead, the Motion merely asks for suspension of the Order and requests that the Department conduct a technical session addressing operational issues (Motion at 17). RESA's February 7, 2006 letter to the Department also fails to cite the Department's standard of review for requesting a stay, but supports its request based on its conclusion that a stay will "avoid delay in customer enrollments and the resulting market disruptions that surely will arise from the new tariffs, absent modification" (RESA February 7, 2006 Letter at 1). Accordingly, the Department need not act on RESA's requests to stay the Order.

However, if the Department were to apply its standard of review for granting a stay pending judicial appeal of a Department order, RESA's request must fail. As noted previously, as to the merits of RESA's allegations, RESA has not provided the Department with any new information or alleged any mistake that would suggest that its Motion will prevail on the merits. Moreover, there is no irreparable harm to RESA or its

membership if a stay is not granted; indeed, as the Department concluded in the Order, there is the real and immediate prospect that other customers will be harmed if the Department grants the stay, since the practice of multiple switching has the potential to raise prices to other customers who rely on Basic Service as a service of last resort. For these same reasons, the public interest does not warrant a stay. The Department's ruling acknowledges that the short-term solution proposed by NSTAR Electric is necessary in order to avoid the harm to the public interest that would result by allowing the use of Basic Service as a competitive option. Accordingly, the Department should reject RESA's request for a stay.

VI. CONCLUSION

RESA's Motion is perplexing. NSTAR Electric's proposal in this proceeding was offered as a good-faith effort to address an issue that has had an adverse affect on the Company's customers. Moreover, the Company welcomed the opportunity during the proceeding to revise its initial proposal to address issues raised by the retail competitive suppliers or any other interested participant. Indeed, the Company acknowledged a legitimate issue raised by the suppliers regarding customers that are placed on Basic Service at the end of a contract and addressed it by proposing revised language. However, the Motion criticizes the Company for its attempt at carving out an exception to a blanket six-month prohibition on customers returning to their previous competitive supplier. It also makes the unsubstantiated and baseless claim that NSTAR Electric has demonstrated a "willingness to disregard the Department's orders" (Motion at 10).

The Company has taken great pains to not place blame on any particular RESA member company for the multiple switching practices that the Company has identified

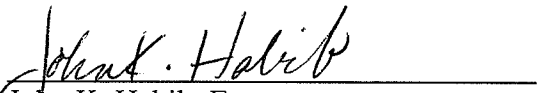
and has also attempted throughout this proceeding to work with the participants to identify a narrowly-tailored, effective, short-term solution to this manipulation of the Department's Basic Service policy. The Company could have recommended, and the Department could have endorsed, the more limiting "anti-gaming" policies of Maine and Connecticut that require customers leaving competitive supply for distribution generation service to remain there for one year. As the Department's policies are implemented in the future, the Company hopes that RESA will join NSTAR Electric in its attempt to protect the vast majority of customers from the adverse effects of multiple switching and parking large customers on Basic Service, rather than continue to advocate for a policy that protects the very few retail competitive suppliers that condone, and apparently wish to continue, the practice.

For the foregoing reasons, the Department should deny RESA's Motion for Reconsideration and Clarification, as well as RESA's request to stay the Department's Order in D.T.E. 05-84.

Respectfully submitted,

BOSTON EDISON COMPANY
CAMBRIDGE ELECTRIC LIGHT COMPANY
COMMONWEALTH ELECTRIC COMPANY

By their Attorney,



John K. Habib, Esq.
Keegan Werlin LLP
265 Franklin Street
Boston, MA 02110
(617) 951-1400

Dated: February 15, 2006